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No. 85-1702

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

v.

GARY C. LANCASTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Since the Petition in this case was filed, the Court has granted the petition in *The Atchison, Topeka and Santa Fe Railway Company* v. *Buell*, No. 85-1140. *Buell*, like this case, raises the issue of the interplay between the Railway Labor Act ("RLA"), 45 U.S.C. § 151, and the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51. More specifically, both cases raise the question whether an employee, who has suffered purely emotional injury as a result of misconduct of his supervisors, may avoid the exclusive mandatory arbitration requirements of the RLA by filing a claim for damages under the FELA.

Although the facts in this case differ from those in *Buell*—Respondent here, unlike *Buell*, has alleged traditional tort claims—this Court's decision in *Buell* may control this case. At a minimum, the principles set forth in the Court's decision should provide useful guidance for the disposition of this case. Therefore, this case should, at the very least, be held pending resolution of *Buell*.

None of Respondent's arguments supports a contrary conclusion.

Respondent's threshold argument is that this case is not properly before this Court because the collective bargaining agreement between Petitioner and Respondent's union was not introduced into evidence in the District Court (Br. Opp. at 11-12). Respondent's argument wholly miscomprehends the source of the duty to submit workplace disputes to the grievance procedures set forth in the RLA. As this Court made clear in *Andrews* v. *Louisville and N.R. Co.*, 406 U.S. 320, 323 (1972), "the compulsory character of the administrative remedy provided by the Railway Labor Act . . . stems not from any contractual undertaking between the parties but from the Act itself." Thus, Respondent's failure to pursue his claims concerning his supervisors pursuant to the grievance procedures provided under the RLA raises a question concerning the jurisdiction of the District Court—a question which, of course, cannot be waived. *See*, e.g., *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583 (1939). Petitioner raised this jurisdictional question both in the District Court and in the Court of Appeals, which addressed the issue at length in its opinion (Pet. App. at 4a-14a).

Respondent's argument that his claims properly arise under the FELA miscomprehends the question presented. The Court of Appeals explicitly found that Respondent's claims could have been resolved under the grievance mechanism provided under the RLA (Pet. App. at 12a). The fact that Respondent's claims might otherwise properly arise under the FELA, absent the prescription of the RLA, is *not* the end of the dispute as Respondent suggests (Br. Opp. at 18; whether "Lancaster could have filed a grievance under the RLA is of no importance"). To the contrary, as discussed in the Petition (at 11-13), Congress, this Court, and the courts of appeals for several circuits have made clear that the scope of the RLA's coverage is broad and where it applies the RLA's remedies are *exclusive*.[1] The decision of the Seventh Circuit

[1] As his last argument, Respondent, citing *Farmer* v. *United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290

here—as well as that of the Ninth Circuit in *Buell*—conflicts with those authorities, and it is precisely this conflict which this Court's decision in *Buell* will address. At a minimum, therefore, the parties and the Seventh Circuit are entitled to the benefit of the Court's decision in *Buell* before this case is finally decided.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case should be granted. Alternatively, the Court should retain this case on its docket pending decision on the merits of No. 85-1140.

Respectfully submitted,

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(1977), asserts that even if the RLA applies to this case, the claims here can be brought under the FELA without interfering with the objectives of the RLA. This claim is erroneous because Congress' express purpose in enacting the RLA is "to provide for the prompt and orderly settlement of *all* disputes growing out of grievances." 45 U.S. § 151(a)(5). The Court of Appeals' application of the *Farmer* exception in this case is premised on the theory that the preemptive scopes of the RLA and the National Labor Relations Act are the same (Pet. App. at 13a-14a). This premise, however, conflicts with several other decisions. *See Andrews v. Louisville & N.R. Co., supra,* 406 U.S. at 323; *Peterson* v. *Air Line Pilots Ass'n, Int'l,* 759 F.2d 1161, 1169 and n.28 (4th Cir. 1985); *Jackson* v. *Consolidated Rail Corp.,* 717 F.2d 1045, 1052 (7th Cir. 1983), *cert. denied,* 104 S. St. 1000 (1984).